

Honorable Judge Benjamin H. Settle

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

CLYDE RAY SPENCER ,

Plaintiff,

v.

JAMES M. PETERS, et al.,

Defendants.

NO. C11-5424 BHS

DEFENDANTS' TRIAL BRIEF

**TRIAL DATE:  
January 7, 2014**

**I. INTRODUCTION**

Defendants Davidson and Krause hereby jointly submit this trial brief to assist the Court in making evidentiary rulings, addressing FRCP 50 motions for judgment as a matter of law, and determining proper jury instructions. To further assist in this process, defendants have submitted motions in limine and responses to plaintiff's motions in limine, which are incorporated herein by reference. Defendants' briefs in support of summary judgment are also incorporated herein by reference.

**II. LAW AND ARGUMENT**

**A. Summary of Remaining Issues for Trial**

This Court previously granted in large part defendants' summary judgment motions and dismissed many of plaintiff's claims. *See, e.g.*, Dkt. 91, 93, 97, 98, 174, 179, 180, 182, 186, and

1 187. However, the Court denied summary judgment on defendants' affirmative defense of  
 2 qualified immunity from plaintiff's claim of deliberate fabrication of evidence. Dkt. 180 pp. 26-  
 3 27; Dkt. 187, p. 12.

4 To determine whether defendants are entitled to qualified immunity, the Court concluded  
 5 a jury will need to resolve a pivotal factual dispute: Did Krause deliberately misquote children's  
 6 statements in her police reports knowing plaintiff was innocent? *Id.* If the jury answers this  
 7 pivotal factual question in the negative, defendants would be entitled to qualified immunity and  
 8 dismissal of plaintiff's claims against them. *See id.* The Court further concluded that resolution  
 9 of this pivotal factual issue also determines whether there was probable cause supporting  
 10 plaintiff's arrest and prosecution (which is a complete defense to plaintiff's claims), whether  
 11 defendants proximately caused plaintiff's alleged damages, which all flow from his  
 12 imprisonment, and whether defendants conspired to violate plaintiff's constitutional rights. Dkt.  
 13 180, pp. 31, 39; Dkt. 187, pp. 13, 18-19. In summary, if the Court concludes under FRCP 50(a),  
 14 or the jury concludes after deliberation, that Krause did not deliberately misquote statements in  
 15 her police reports, it follows that defendants are entitled to qualified immunity, probable cause  
 16 existed for plaintiff's arrest and prosecution, defendants did not proximately cause plaintiff's  
 17 damages, and there was no conspiracy to violate constitutional rights. *Id.*

18 On the other hand, even if the jury were to decide Krause deliberately misquoted  
 19 statements in her police reports, the jury could nonetheless conclude there was probable cause  
 20 independent of the falsely quoted statements in the police reports, based on the strength of the  
 21 remaining accurately reported information either alone or in combination with independent  
 22 evidence such as Kathryn Spencer's disclosures of abuse before Krause interviewed her. *See*  
 23 *Hervey v. Estes*, 65 F.3d 784, 788-90 (9<sup>th</sup> Cir. 1995). The jury also could conclude defendants  
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1 did not proximately cause plaintiff's arrest, prosecution and imprisonment based on this  
 2 accurately reported and/or independent evidence. Even if the jury found deliberate fabrication,  
 3 lack of probable cause, and that defendants proximately caused plaintiff's damages, the jury still  
 4 could nonetheless conclude there was no agreement between Davidson and Krause to violate  
 5 plaintiff's constitutional rights sufficient to prove a conspiracy.  
 6

7 This summary of the remaining issues sets the stage for determining the relevancy of  
 8 offered evidence, the legally sufficient evidentiary bases needed to withstand a FRCP 50(a)  
 9 motion, the instructions necessary to enable the jury to make findings on the pivotal factual  
 10 issues, and the type of verdict form that should be used. Since the evidentiary issues are  
 11 addressed in defendants' motions in limine and response to plaintiff's motions in limine,  
 12 defendants will not repeat those arguments in this trial brief. The substantive law supporting  
 13 defendants' planned FRCP 50(a) motion is set forth in defendants' summary judgment briefs  
 14 and also will not be repeated in this trial brief. This trial brief focuses on the verdict form that  
 15 should be used and the instructions needed to enable the jury to make findings on each  
 16 submitted issue.  
 17

18 **B. Defendants' Proposed Special Verdict Form Should Be Used Rather**  
 19 **Than Plaintiff's Proposed General Verdict Form**

20 Because resolution of this case turns on the pivotal factual issue of whether Krause  
 21 deliberately misquoted statements in her police reports, a special verdict form is appropriate  
 22 pursuant to FRCP 49(a). In accordance with FRCP 49(a), defendants have proposed a special  
 23 verdict form requiring the jury to make special written findings on each dispositive issue of fact  
 24 in the order discussed above. Defendants' special verdict form is patterned off of the  
 25 recommended special verdict form set forth in the Ninth Circuit Manual of Model Civil Jury  
 26

Instructions 12.1A, as modified, and Washington Pattern Instruction 45.23, as modified. This special verdict form consists of five questions. A copy of defendants' proposed special verdict form is attached to this brief as Appendix 1 for ease of reference.

**Question 1:** If the jury answers the first interrogatory on this special verdict form in the negative - - *i.e.*, that plaintiff did not prove Krause and Davidson deliberately fabricated quoted statements in police reports - - they should return a defense verdict because resolution of this pivotal factual issue results in the defendants being entitled to qualified immunity, demonstrates probable cause existed, and further resolves the issue of whether defendants proximately caused plaintiff's alleged damages. A negative answer also resolves plaintiff's conspiracy claim because the essential element of a constitutional violation would be lacking if the jury concludes defendants did not deliberately fabricate evidence. *See* Dkt. 180, pp. 31, 39; Dkt. 187, pp. 13, 18-19.

**Question 2:** If the jury answers the first interrogatory in the affirmative, defendants would still be entitled to a defense verdict if the jury answers the second interrogatory in the negative - - *i.e.*, that plaintiff did not prove Krause and Davidson knew or should have known plaintiff was innocent. In order to establish liability for alleged deliberate fabrication of false evidence, plaintiff "must, *at a minimum*, point to evidence that ... Defendants continued their investigation ... despite the fact that they knew or should have known that he was innocent ...." *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*italics in original*); *see also id.* at 1077 ("What is required is ... a showing that the interviewer knew or should have known that the alleged perpetrator was innocent").

Because these first two questions on the special verdict form will be decided by consideration of different evidence, an affirmative answer to the first interrogatory does not

necessarily compel the same answer to the second interrogatory. The jury conceivably could conclude deliberate fabrication occurred, but that defendants neither knew, nor should have known, that plaintiff was innocent. In other words, the jury could conclude deliberate fabrication occurred to further strengthen the case against a man defendants reasonably believed was guilty. *See, e.g., Costanich v. Dept. of Soc. & Health Servs.*, 627 F.3d 1101, 1116 (9<sup>th</sup> Cir. 2010) (affirming summary judgment for DSHS supervisory officials reasoning that “[s]ome evidence may be read to suggest that someone at DSHS was improperly motivated to terminate Costanich’s guardianship of E. and B. ... It is reasonable, however, that the DSHS officials believed their actions regarding the termination proceedings were justified based on Costanich’s undisputed use of profanity around the children, even if they had reason to question some of the conclusions in Duron’s investigation, and Costanich has adduced no evidence to the contrary.”). Under *Costanich* and *Devereaux*, a specific finding of defendants’ actual or constructive knowledge of plaintiff’s innocence is a prerequisite to finding liability, so defendants’ proposed second interrogatory on the special verdict form is appropriate.

**Question 3:** Even if the jury answers the first two interrogatories in the affirmative, defendants would still be entitled to a defense verdict based on lack of causation. If the jury determines that after removing all of the statements in the police reports that they find were falsely quoted, there was still sufficient remaining information to establish probable cause supporting a lawful arrest and prosecution, then plaintiff will have failed to meet his burden to prove deliberately fabricated quotations in police reports caused his imprisonment. *Hervey*, 65 F.3d at 788-90. This determination that probable cause existed and proximate causation was lacking would be dispositive of plaintiff’s conspiracy claim as well because no constitutional violation would have been proved. Thus, the third interrogatory on defendants’ proposed special

1 verdict form regarding causation is appropriate.

2       **Question 4:** Even if the jury concludes defendants deliberately fabricated evidence  
 3 knowing plaintiff was innocent and, without that fabricated evidence probable cause was  
 4 lacking, the jury could nonetheless conclude these constitutional violations were not the product  
 5 of a conspiracy. Therefore, defendants' proposed fourth interrogatory specifically seeks the  
 6 jury's determination on whether plaintiff has proved his conspiracy theory.  
 7

8       **Question 5:** Finally, if the jury answers "yes" to either question 3, or questions 3 and 4,  
 9 then the jury has to decide whether plaintiff has proved he was damaged and the total amount of  
 10 damages, if any, to which he is entitled. The only damages claimed by plaintiff are non-  
 11 economic damages, such as emotional distress and loss of enjoyment of life. Accordingly, the  
 12 fifth and final interrogatory in defendants' proposed special verdict form asks the jury to provide  
 13 a dollar amount for the total amount of plaintiff's alleged damages.  
 14

15       **Plaintiff's Proposed General Verdict Form Is Insufficient and Improper:** The five  
 16 questions in defendants' proposed special verdict form fully encompass all of the claims,  
 17 defenses and material questions of fact remaining in this case. In contrast, plaintiff has proposed  
 18 a general verdict form asking the jury to award damages against each defendant separately, for  
 19 each of plaintiff's five remaining causes of action. This proposed general verdict form fails to  
 20 account for the Court's summary judgment rulings, and fails to address the specific factual  
 21 questions this Court has held the jury must determine to resolve the issue of whether defendants  
 22 are entitled to qualified immunity. Thus, the Court should reject plaintiff's proposed general  
 23 verdict form on this ground alone.  
 24

25       Additionally, plaintiff's proposed general verdict form is improper because it invites the  
 26 jury to render up to ten different awards of damages (as to each of the two defendants on each of

1 five claims). This proposal is confusing, misleading and improperly seeks duplicative (or more)  
 2 damages. If the jury finds both defendants are liable, they will each be liable for all of the  
 3 damages awarded to plaintiff. In the absence of a request by defendants, there is no reason to  
 4 require the jury to make separate damage determinations for each defendant. Similarly, if the  
 5 jury finds one or both defendants are liable on any one or more of plaintiff's claims, the jury  
 6 should only award one total amount of damages. Plaintiff's alleged damages stem from his  
 7 arrest, prosecution and imprisonment, all of which could only have been found to be caused by  
 8 the alleged deliberate fabrication of evidence, as this Court has ruled on summary judgment.  
 9 Dkt. 180, pp. 31, 39; Dkt. 187, pp. 13, 18-19. Because an essential element of plaintiff's  
 10 conspiracy claim requires a finding of a constitutional violation, and the only constitutional  
 11 violation remaining at issue is the alleged deliberate fabrication of evidence (*id.*), a finding of a  
 12 conspiracy would provide an additional basis for liability, but not additional damages. Under  
 13 these circumstances, it is unnecessary, confusing, and misleading to require the jury to decide  
 14 which claim(s) caused more or less of the total non-economic damages they may award. For all  
 15 of these reasons, plaintiff's proposed general verdict form should be rejected, and defendants'  
 16 proposed special verdict form should be used.

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 18  
 19 **C. Defendants' Proposed Jury Instructions On The Remaining Claims**  
 20 **Should Be Used Rather Than Plaintiff's Proposed Instructions**

21 **1. Preliminary Claims Instructions**

22 The main difference between plaintiff's proposed jury instructions and defendants'  
 23 proposed jury instructions arises from each side's proposed preliminary instruction  
 24 summarizing plaintiff's claims using the format in 9<sup>th</sup> Circuit Manual of Model Civil Jury  
 25 Instructions (MCJI) 1.2. *Compare* plaintiff's Preliminary Instruction No. 2, *with* defendants'  
 26

1 Preliminary Instruction No. 1. Plaintiff's Preliminary Instruction No. 2 is inconsistent with the  
 2 Court's summary judgment rulings, which have made the false arrest, malicious prosecution,  
 3 false imprisonment, and conspiracy claims dependent and contingent upon plaintiff proving his  
 4 deliberate fabrication of evidence claim.

5 Specifically, the Court's analysis of plaintiff's claims against defendant Krause began as  
 6 follows:  
 7

8 The Court begins its discussion of qualified immunity with an analysis of  
 9 whether the evidence demonstrates that a genuine issue of material fact exists  
 10 that Krause coerced the children into accusing Mr. Spencer of abuse or  
 11 otherwise fabricated evidence against him regarding the abuse. The Court starts  
 12 its analysis here because if genuine issues of material fact exist as to the  
 13 aforementioned issues, then more likely than not there will be genuine issues of  
 14 material fact related to Mr. Spencer's claims that probable cause did not exist,  
 15 Krause was involved in the alleged conspiracy to imprison Mr. Spencer, and she  
 16 was a proximate cause of Mr. Spencer's injuries.

17 Dkt. 180, p. 19, ll. 17 - p. 20, ll. 1-2. Consistent with this analysis, the Court ultimately ruled on  
 18 plaintiff's claims against defendant Krause as follows:

19 Because there are genuine issues of fact regarding whether Krause fabricated  
 20 evidence in the child victim statements, which was, in large part, what the  
 21 Prosecutor's Office relied on to find probable cause existed and to charge Mr.  
 22 Spencer with multiple counts of abuse (Dkt. 168-11 at 11 and 14), the Court  
 23 cannot grant qualified immunity on the basis that probable cause exists and  
 24 must deny summary judgment on Krause's claims of false arrest, malicious  
 25 prosecution and false imprisonment. *See supra*.

26 Dkt. 180, p. 31, ll. 17-22. Due to this question of fact regarding whether the children's  
 statements were deliberately fabricated, the Court also denied summary judgment on plaintiff's  
 conspiracy claim. Dkt. 180, p. 39, ll. 7-14. This same question of fact also caused the Court to  
 deny summary judgment based on lack of proximate cause. *Id.* at ll. 16-19.

The Court followed the same analysis and rendered the same ruling with regard to  
 plaintiff's claims against defendant Davidson. The Court's analysis of plaintiff's claims against  
 defendant Davidson began as follows:



1 The Court begins its discussion of qualified immunity and supervisory liability  
 2 with an analysis of whether the evidence demonstrates that a genuine issue of  
 3 material fact exists regarding whether Davidson fabricated evidence against Mr.  
 4 Spencer or whether he may be liable in his supervisory capacity for Krause's  
 5 alleged fabrication of evidence. The Court starts its analysis here because if  
 6 genuine issues of material fact exist as to these issues, then it is also likely that  
 7 there will be genuine issues of material fact related to whether probable cause  
 8 existed, Davidson was involved in the alleged conspiracy to imprison Mr.  
 9 Spencer, and he was a proximate cause of Mr. Spencer's injuries.

10 Dkt. 187, p. 8, l. 17 - p. 9, l. 3. Applying this analysis, the Court ruled as follows:

11 Whether Krause fabricated the children's statements, whether Davidson knew  
 12 or should have known of Krause's conduct and to what extent he participated in  
 13 the fabrications, and whether the alleged fabrications are evidence of Mr.  
 14 Spencer's innocence are all factual determinations for the jury to make.  
 15 Therefore, the Court declines to grant Davidson qualified immunity on the  
 16 claims that he knew of deliberately fabricated evidence or is liable as a  
 17 supervisor for Krause's fabrication.

18 Dkt. 187, p. 12, ll. 15-20.

19 Due to the question of fact regarding whether the children's statements were deliberately  
 20 fabricated, the Court further denied Davidson's motion that he was entitled to qualified  
 21 immunity based on probable cause, ruling as follows:

22 Because the investigative reports containing the alleged fabrications were, in  
 23 large part, what the Prosecutor's Office relied on to find probable cause existed  
 24 and to charge Mr. Spencer with multiple counts of abuse (Dkt. 168-11 at 11 and  
 25 14), the Court cannot grant qualified immunity on the basis that probable cause  
 26 exists. Therefore, summary judgment is denied on the claims for false arrest,  
 malicious prosecution and false imprisonment.

27 Dkt. 187, p. 13, l. 19 – p. 14, l. 2. The Court similarly denied summary judgment regarding  
 28 plaintiff's conspiracy claim due to the question of fact regarding whether the children's  
 29 statements were deliberately fabricated. Dkt. 187, p.18, l. 20 – p. 19, l. 10. Based on the same  
 30 question of fact, the Court denied summary judgment on the grounds that proximate cause was  
 31 lacking, ruling as follows:

1 Because there are genuine issues of material fact as to the fabrication of  
 2 evidence against Mr. Spencer and Davidson's role with respect to the alleged  
 3 fabrications and the continuance of the investigation, a genuine issue of material  
 4 fact also exists regarding whether or not Davidson was a proximate cause of Mr.  
 Spencer's alleged injuries. Therefore, summary judgment is denied on this  
 basis.

5 Dkt. 187, p. 19, ll. 12-16.

6 Another important consideration defining the extent and scope of the issues left for  
 7 resolution by the jury is that the Court has already ruled as a matter of law that in the absence of  
 8 deliberate fabrication of the children's statements in Krause's reports, the Prosecutor's Office  
 9 reasonably concluded that probable cause existed to file and prosecute the charges in the  
 10 original, amended and second amended informations involving all three victims. *See* Dkt. 174,  
 11 p. 15, l. 17 - p. 28, l. 15. Based on this finding of probable cause, the Court summarily  
 12 dismissed the false arrest, malicious prosecution, false imprisonment and conspiracy claims  
 13 against former defendant Peters. *Id.* Thus, if the jury concludes the children's statements were  
 14 not deliberately fabricated, probable cause exists, which is a complete defense to plaintiff's  
 15 remaining claims. *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054-55 (9<sup>th</sup> Cir. 2009).

17 Plaintiff's Preliminary Instruction No. 2 is inconsistent with this analysis, as it describes  
 18 deliberate fabrication of evidence as an independent claim that is analyzed separately and  
 19 distinctly from plaintiff's claims for false arrest, false imprisonment, malicious prosecution and  
 20 conspiracy. Defendants' Preliminary Instruction No. 1 follows the Court's analysis set forth  
 21 above, as it recognizes the dependence of the false arrest, malicious prosecution, false  
 22 imprisonment, and conspiracy claims upon proof of the claim of deliberate fabrication of  
 23 evidence. A copy of defendant's Preliminary Instruction No. 1 is attached to this brief as  
 24 Appendix 2 for ease of reference.  
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 26

1 Plaintiff's Preliminary Instruction No. 1 is also factually unsupported, as there will be no  
 2 testimony or evidence that either defendant arrested plaintiff without a warrant, based on their  
 3 own determination of probable cause. Rather, the original Information charging plaintiff with  
 4 the crimes involving Kathryn Spencer was filed on January 3, 1985 and was accompanied by a  
 5 summons which prompted plaintiff's appearance in court, at which time he was booked and  
 6 released on his own recognizance (Dkt. 63-2, pp. 2-3); the Amended Information adding  
 7 charges against plaintiff for crimes against Matthew Hansen was filed on February 28, 1985 and  
 8 was accompanied by a judicial Warrant for Arrest obtained by former defendant Peters, leading  
 9 to plaintiff's arrest and incarceration until he was convicted and sentenced to prison (Dkt. 63-4  
 10 and 63-5); and the Second Amended Information adding charges against plaintiff for crimes  
 11 committed against Matthew Spencer was filed on May 3, 1985, while plaintiff was still  
 12 incarcerated at the jail awaiting trial (Dkt. 63-6). Under these facts, it is misleading and  
 13 confusing for plaintiff to allege false arrest, malicious prosecution, false imprisonment and  
 14 conspiracy claims independent of the allegedly fabricated evidence on which the Prosecutor's  
 15 Office and the criminal court acted.

18 For all of the foregoing reasons, defendants' Preliminary Instruction No. 1 should be  
 19 given, and plaintiff's Preliminary Instruction No. 2 should be rejected.

## 20 **2. Instructions on the Elements of Plaintiff's Claims and Burden of Proof**

21 The key differences explained above between the parties' preliminary claims instructions  
 22 are carried forward into the instructions setting forth the elements and burdens of proof on the  
 23 remaining claims. Consistent with plaintiff's Preliminary Instruction No. 2, plaintiff has  
 24 proposed separate instructions for false arrest (plaintiff's Closing Instruction No. 22), false  
 25 imprisonment (plaintiff's Closing Instruction No. 23), malicious prosecution (plaintiff's Closing  
 26

1 Instruction Nos. 26 and 27), and conspiracy (plaintiff's Closing Instruction No. 30) that are all  
 2 framed as being independent of the instruction on deliberate fabrication of evidence (plaintiff's  
 3 Closing Instruction No. 29). Each of these Closing Instructions are then incorporated into  
 4 plaintiff's burden of proof instructions for his claims against defendant Sharon Krause  
 5 (plaintiff's Closing Instruction No. 18), defendant Michael Davidson in his individual capacity  
 6 (plaintiff's Closing Instruction No. 19) and defendant Michael Davidson in his supervisory  
 7 capacity (plaintiff's Closing Instruction No. 20). All of these instructions should be rejected for  
 8 the same reasons advanced above in support of the argument for rejection of plaintiff's  
 9 Preliminary Instruction No. 2.

11 Plaintiff compounds the problems created by these erroneous and factually unsupported  
 12 instructions by proposing an ill-fitting "moving force" proximate cause instruction based on  
 13 MCJI 9.8 (plaintiff's Closing Instruction No. 21), and a separate and incomplete probable cause  
 14 instruction based on MCJI 9.20 (plaintiff's Closing Instruction No. 24), both of which should be  
 15 rejected. The comments to MCJI 9.8 make clear that the "moving force" causation standard is  
 16 taken from §1983 *Monell* municipal liability cases, citing *Oviatt v. Pearce*, 954 F.2d 1470 (9<sup>th</sup>  
 17 Cir. 1992). The comments to MCJI 9.8 also cite §1983 First Amendment discrimination cases  
 18 as an example of a type of case requiring use of a causation standard different from the "moving  
 19 force" instruction.

21 Plaintiff's deliberate fabrication of evidence claims in this case require use of the  
 22 particularized causation standard set forth in *Hervey v. Estes*, 65 F.3d 784, 788-90 (9<sup>th</sup> Cir.  
 23 1995). Similar to plaintiff's claims here, *Hervey* involved §1983 claims that a police officer  
 24 deliberately included false and misleading information in an affidavit submitted in support of a  
 25 request for a search warrant. The court in *Hervey* cited *Branch v. Tunnell*, 937 F.2d 1382 (9<sup>th</sup>  
 26

1 Cir. 1991) as controlling, explaining the *Branch* holding as follows:

2 We held that the standard for qualified immunity in a civil rights action of this  
 3 type was governed by *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57  
 4 L.Ed.2d 667 (1978). *Franks* established a criminal defendant's right to an  
 5 evidentiary hearing when he made a substantial showing of deliberate falsehood  
 6 or reckless disregard for the truth in a search warrant affidavit and demonstrated  
that but for the dishonesty, the affidavit would not support a finding of probable  
cause. *Id.*, at 171-72, 98 S.Ct. at 2684-85.

7 *Hervey*, 65 F.3d at 788 (emphasis added). Continuing its discussion of the standard for proving  
 8 causation in a deliberate fabrication case, the court explained that “[p]ut another way, the  
 9 plaintiff must establish that the remaining information in the affidavit is insufficient to establish  
 10 probable cause.” *Hervey*, 65 F.3d at 789. In other words, plaintiff must prove that, but for the  
 11 deliberately fabricated evidence, probable cause was lacking.

12 The “but for” test for causation is commonly used in §1983 cases. *E.g.*, *Arnold v. IBM*  
 13 *Corp.*, 637 F.2d 1350, 1355 (9<sup>th</sup> Cir. 1981). This is not a municipal liability case where a  
 14 “moving force” causation test may be appropriately used.

15 Proposed in place of all of the above-identified Closing Instructions proposed by  
 16 plaintiff, Defendants’ Closing Instruction No. 6 efficiently synthesizes the applicable elements  
 17 of a deliberate fabrication of evidence claim from *Devereaux*, 263 F.3d at 1076-77, and  
 18 *Costanich*, 627 F.3d at 1111-12, with the “but for” causation standard from *Hervey* applicable to  
 19 cases involving alleged deliberate fabrication of evidence claims linked to the determination of  
 20 probable cause. Defendants’ Closing Instruction No. 7 further defines “but for” proximate cause  
 21 consistent with WPI 15.01.01, while Defendants’ Closing Instruction No. 8 properly adapts the  
 22 language from MCJI 9.20 instructing the jury on “probable cause” and defining the relevant  
 23 State crimes for which plaintiff was charged. Copies of defendants’ Closing Instructions Nos. 6-  
 24 9 are attached to this brief as Appendix 3 for ease of reference.

1 Defendants' Closing Instruction No. 6 leads logically and understandably to the Special  
 2 Verdict Form proposed by defendants, listing the three necessary elements of a deliberate  
 3 fabrication of evidence claim as Question 1 (deliberate fabrication of quoted statements),  
 4 Question 2 (with actual or constructive knowledge that plaintiff was innocent) and Question 3  
 5 ("but for" causation on the probable cause determination).

6  
 7 Finally, as discussed above, plaintiff's claim that defendants Krause and Davidson  
 8 engaged in a conspiracy to frame him of crimes he did not commit warrants an independent  
 9 instruction. While plaintiff's Closing Instruction No. 30 addresses the conspiracy claim, it reads  
 10 more like a closing argument than a jury instruction. It contains language well beyond the  
 11 elements needed to prove a conspiracy, all of which is suggestive of ways of finding liability.  
 12 Some of the language is also redundant of other instructions, such as reference to the use of  
 13 circumstantial evidence, which is already covered by an agreed MCJI 1.9 instruction. In  
 14 contrast, defendants' Closing Instruction No. 9 (citing *Avalos v. Baca*, 596 F.3d 583, 592 (9<sup>th</sup>  
 15 Cir. 2010) in support) properly instructs the jury on the elements of a conspiracy claim in a  
 16 neutral manner and does not instruct the jury in the negative as plaintiff's proposed instruction  
 17 number 30 does (stating what plaintiff allegedly does not have to prove).

18  
 19 For all of the foregoing reasons, defendants request that their claims and burden of proof  
 20 instructions be given, and plaintiff's instructions on the same subjects be rejected.

21  
 22 RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of December, 2013.

23 s/ Guy Bogdanovich  
 24 GUY BOGDANOVICH, WSBA No. 14777  
 25 Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S.  
 26 P.O. Box 11880  
 Olympia, WA 98508-1880  
 Telephone: (360) 754-3480  
 Fax: (360) 357-3511  
 Email: [gbogdanovich@lldkb.com](mailto:gbogdanovich@lldkb.com)  
 Attorney for defendant Sharon Krause

1 s/Jeffrey A. O. Freimund  
2 JEFFREY A. O. FREIMUND, WSBA No. 17384  
3 Freimund Jackson & Tardif, PLLC  
4 711 Capitol Way South, Suite 602  
5 Olympia, WA 98502  
6 Telephone: (360) 534-9960  
7 Fax: (360) 534-9959  
8 Email: [jeffF@fjtlaw.com](mailto:jeffF@fjtlaw.com)  
9 Attorney for defendant Michael Davidson  
10  
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 17, 2013, I caused to be electronically filed Defendants' Trial Brief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Douglas H. Johnson, Attorney Pro Hac Vice for Plaintiff Clyde Ray Spencer  
[dhjohnson43@aol.com](mailto:dhjohnson43@aol.com)

Kathleen T. Zellner, Attorney Pro Hac Vice for Plaintiff Clyde Ray Spencer  
[kathleen.zellner@gmail.com](mailto:kathleen.zellner@gmail.com)

Daniel T. Davies, Attorney for Plaintiff Clyde Ray Spencer  
[dandavies@dwt.com](mailto:dandavies@dwt.com)

s/Kathrine Sisson  
KATHRINE SISSON  
Legal Assistant to  
JEFFREY A. O. FREIMUND, WSBA No. 17384  
Freimund Jackson & Tardif, PLLC  
711 Capitol Way South, Suite 602  
Olympia, WA 98502  
Telephone: (360) 534-9960  
Fax: (360) 534-9959  
[jeffF@fjtlaw.com](mailto:jeffF@fjtlaw.com)  
Attorney for defendant Michael Davidson